

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EAST MOUNTAIN PROCESSING, L.L.C.

Employer

and

Case No. 11-RC-6455

UNITED MINE WORKERS OF AMERICA

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 1/

All production and maintenance employees employed by the Employer at its Appalachia, Virginia facility; excluding office clerical employees, independent truckers, and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

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engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

United Mine Workers of America

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office of the National Labor Relations Board, Region 11, 4035 University Parkway, Suite 200, P. O. Box 11467, Winston-Salem, North Carolina 27116-1467, on or before **August 17, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **August 24, 2001**.

Dated August 10, 2001

at Winston-Salem, North Carolina

/s/Willie L. Clark, Jr.

Regional Director, Region 11

1/ East Mountain Processing, L.L.C., the Employer, is a Virginia corporation, with a facility located in Appalachia, Virginia, where it operates a coal preparation plant. During the preceding twelve (12) months, the Employer purchased and received goods and materials valued in excess of \$50,000.00 directly from points located outside the Commonwealth of Virginia.

The Employer and United Mine Workers of America (“the Petitioner”) filed briefs which have been carefully considered. The Employer and Petitioner agree that a unit comprised of production and maintenance employees is an appropriate unit. The sole issue is the status of individual Thomas Moore. The Petitioner contends that Moore is a supervisor and, therefore, should be excluded from the unit, whereas the Employer asserts that Moore is a nonsupervisory employee who should be included in the unit.

Regarding supervisory status, Section 2(11) of the Act provides:

The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well-settled that supervisory status is conferred by the possession of any one of those primary indicia. Baby Watson Cheesecake, Inc., 320 NLRB 779, 783 (1996). When no primary indicia are found, secondary criteria such as job title, designation as a supervisor, attendance at supervisory meetings, etc. are insufficient by themselves to establish supervisory status. Id. at 784. The Board has frequently observed that “only truly supervisory personnel vested with ‘genuine management prerogatives’ should be considered supervisors, and not ‘straw bosses, leadmen, set-up men and other minor supervisory employees.’” Id. at 783 (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). Here, the burden is on the Union to prove that Moore is a supervisor. Id. at 784.

The Employer operates a coal preparation plant and utilizes a 24-hour per day operation. Coal is washed, processed, and cleaned on the first and second shift. Maintenance and repair is performed on the third shift. The parties stipulated that Superintendent Estil Williams, Second Shift Supervisor Tom Bryington, and Roger Short are supervisors. It is also uncontradicted that Bill Porter is a supervisor as well.

The record shows that Moore is employed as a welder and repairman on the third shift. There are four additional employees on the third shift: Don Eastland (an electrician), Charles Hillman (pipefitter and welder), Danny Hillman (pipefitter and welder), and Phil Cooper, a welder and repairman. Cooper is also learning to be a pipefitter by working in a helper capacity with Charles Hillman. There are also three contract workers employed on the third shift.

Moore reports to work at 10:00 p.m., an hour earlier than the rest of the employees on his shift. Once he arrives he meets with Supervisor Bryington who provides Moore with a written list of maintenance and repairs. Bryington prioritizes the list by verbally informing Moore what

the major jobs are and also marks those high priority items on the list with a star. Bryington often takes Moore to the locations of specific jobs showing him what needs to be done or explaining what is wrong. During the shift, Moore personally spends approximately 70 to 80 percent of his time performing small maintenance jobs on his own, which results in him spending most of his time working away from the other employees. At the end of the shift, Moore signs a shift book, which certifies that the areas that the employees worked in were safe. At that time, Moore sometimes informs Supervisor Porter of parts that the men have requested and may report other problems. Moore does not report in detail as to what jobs were completed but may discuss the status of major work that is unfinished, and Porter and/or Williams may inform Moore of additional pending work.

Contrary to the Petitioner's contention that Moore exercises independent judgment in directing employees and assigning their work, the record shows that Moore functions primarily as a conduit for carrying out his superiors' instructions. The record demonstrates that the employees are highly experienced and mostly self-directed. At the beginning of the shift, Moore meets with the other employees and contractors to distribute job assignments from the job list.¹ If there are multiple similar jobs, Moore can decide who takes which job. Often, however, the nature of the job dictates the assignment. Thus, an electrical job would have to be assigned to Eastland. Similarly, larger welding/pipefitting jobs go to Charles Hillman by default because he has a helper, Cooper. Employees may also use discretion, based on their skills and experience, in deciding what assignment to do first. For example, if Eastland was confronted with two faulty motors, Moore would allow Eastland to decide which task to do first. If an employee with specialized knowledge such as Eastland was out sick and was needed to do a particular job, Moore would call Porter and let him handle the situation.

The record also shows that once employees are working, Moore does not instruct the employees in how to do their particular job—some of the employees are more experienced than he is. During the course of the shift, although Moore has authority to instruct an employee to help another employee, he usually does not need to do so. If an employee needs help with a job, he can go directly to another employee for assistance without checking with Moore. In addition, if Moore or the other employees discover a problem during their shift that needs attention, any of the employees have the authority to add a job to the list and indicate whether it is a priority. Generally, when employees complete their specific jobs, they mark that job off the list and usually choose another job from the list. If there is a priority matter that needs to be handled, Moore instructs employees that they have to do that job next. Because of the way the system works, Moore does not necessarily know who is doing what specific job

Based on the foregoing, I conclude that Moore functions as a leadman in that his assignment of work is routine and does not require the use of independent judgment. Moore's ability to direct the men is strongly circumscribed as it is based on tasks which are largely predetermined by others. See generally George C. Foss Co., 270 NLRB 232, 234 (1984) (employee acted as a leadman rather than a supervisor where he made work assignments based on instructions received from others), enforced, 752 F.2d 1407 (9th Cir. 1985); Quadrex

¹ Based on instructions from Porter and others, Moore assigns certified jobs to the contractors that the regular employees cannot get to.

Environmental Co., 308 NLRB 101, 101 (1992) (leadmen not supervisors where they assigned tasks from a detailed project plan prepared by management and their assignment of tasks “demonstrate[d] nothing more than the knowledge expected of experienced persons regarding which employees c[ould] best perform particular tasks”); Hydro Conduit Corporation, 254 NLRB 433, 438-439 (1981) (employee not a supervisor where he assigned tasks from a master schedule prepared by management and occasionally reassigned employees from their normal duties); Southern Industries Co., 92 NLRB 998, 1004 (1950) (work assignments were “routine” where priority of work was determined by others even though lead welder had authority to shift a welder to a more urgent job). Dale Service Corp., 269 NLRB 924, 924-925 (1984), cited by the Petitioner, is distinguishable. There, in addition to assigning particular tasks, the alleged supervisors also had authority to assign overtime, to send employees home in the absence of work, and to call employees in to work, all without prior approval. Those factors are not present here.

In addition, significantly, the record simply does not establish that Moore responsibly directs because he is not held “fully accountable and responsible for the performance and work product of the employee[s] . . .” on his shift. KOFY, Operator of KOFY TV-20, 332 NLRB No. 67, slip op. JD at 19 (2000). Generally all the work cannot be completed on third shift, and the record shows that Moore is not expected to remedy the situation. In Hydro Conduit, even though the employee was responsible for seeing that the work was completed on schedule, the Board concluded that he was not a supervisor. There, the employee was empowered to try to ascertain why the employees were falling behind schedule and try to resolve the situation himself if the problem was routine; otherwise, he was required to inform an admitted supervisor who made the ultimate decision regarding revisions to the schedule in order to meet production. 254 NLRB at 438-439.

With respect to other matters, Moore merely transmits information to management and has no further authority to take or recommend action. For example, if an employee did not show up for work, or refused an assignment, or got sick and wanted to leave early, or came in late, Moore would simply report those matters to Porter. See George C. Foss Co., 270 NLRB at 234 (employee not a supervisor where his reports regarding personnel “were in the nature of relaying information to [an admitted supervisor] from which the latter could make a determination . . .”). Accord Star Trek: The Experience, 334 NLRB No. 29, slip op. JD at 6 (2001).

The record does show that some secondary indicia of supervisory status are present. Thus, Moore is the highest paid employee on his shift making between .50 to .75 more per hour than the other employees. In addition, the Petitioner contends that if Moore is not a supervisor, the third shift employees are effectively unsupervised. In that regard, however, I note that admitted supervisor Bryington is present at the facility for a few hours when the employees are working longer shifts and at least one admitted supervisor is available for consultation. In any event, as shown above, in the absence of at least one primary indicum, secondary criteria are not controlling.

Accordingly, I conclude that Thomas Moore is not a supervisor as defined in the Act and, therefore, I shall include him in the unit described herein.

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